The election must be made with respect to all of the property in the QTIP trust.[7] No partial reverse QTIP elections may be made. IRS has indicated that the regulations will provide, "at a minimum, a form of transitory relief by permitting post-mortem trust severance reformations to enable the estate" of an individual "to conform the QTIP trust to the entire-trust requirement."[8]

Two-trust planning. For an estate in the $1 million range, a workable plan might involve creation of unified credit trust ($600,000 in amount) in the will or revocable trust with the balance in a QTIP trust for which an election is made for the transferor spouse to be treated as the transferor of the entire QTIP (a reverse QTIP election).

The $1 million exemption of the first spouse to die would be used with $400,000 allocated to the QTIP and $600,000 to the unified credit trust.

Three-trust planning. For estates of substantially more than $1 million, the will or revocable trust could create a unified credit trust ($600,000 in amount), a QTIP trust in the amount of $400,000 for which an election is made for the transferor spouse to be treated as the transferor of the entire QTIP (a reverse QTIP election) with the balance outright to the spouse (or in any other form qualifying for the marital deduction).

The $1 million exemption of the first spouse to die would be used with $600,000 allocated to the unified credit trust and $400,000 allocated to the QTIP.

Income tax deduction. An income tax deduction is allowed for the amount of generation skipping transfer tax imposed on income distributions.[9]

FOOTNOTES

1 See I.R.C. § 2623.
2 I.R.C. §§ 2621, 2622.
3 See Ltr. Rul. 8944009, July 31, 1989.
4 I.R.C. § 2652(a)(3). See Ltr. Rul. 9050022, Sept. 14, 1990 (QTIP election for federal estate tax purposes and reverse QTIP election for GSTT purposes); Ltr. Rul. 9101013, Oct. 5, 1990 (same).
5 *Id*.
6 Ltr. Rul. 9125043, no date given.
7 I.R.C. § 2652(a)(3).
8 Ltr. Rul. 9028005, no date given. See Ltr. Rul. 9122071, March 6, 1991 (single trust could be divided into two separate QTIP trusts in conjunction with reverse QTIP election as to one of trusts).
9 I.R.C. § 164(a)(5). See Ann. 91-43, I.R.B. 1991-11, 29.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKING

LIABILITY. After the plaintiffs were not paid for potatoes shipped to a potato broker, the plaintiffs sued the broker's bank, alleging fraud, constructive trust and violation of the Perishable Agricultural Commodities Act (PACA). The fraud action was based on the assertion that the bank's previous honoring of checks written by the broker when the account had insufficient funds was a fraudulent representation that the broker was solvent and had money in the account. The court held that the honoring of such checks was not a representation. The court also held that the bank account was not held as a constructive trust in that the account had no funds to be held and the bank did not use any funds from the account to offset loans to the broker. The court also held that the bank was not an agricultural commodities dealer subject to PACA. **Val-Land Farms, Inc. v. Third Nat'l Bank, 937 F.2d 1110 (6th Cir. 1991)**.

BANKRUPTCY

GENERAL

ESTATE PROPERTY. Under the debtor's Chapter 13 plan, the debtor's debt for a motor vehicle was reduced to the fair market value of the vehicle and the creditor would receive that amount plus 10 percent of the unsecured portion of the debt. After confirmation of the plan, the debtor died and an insurance company paid the creditor the full amount due on the loan, under the debtor's credit life insurance policy. The debtor's estate sought return of the insurance proceeds in excess of the amount to be paid under the plan. The court held that the insurance proceeds were estate property subject to disbursement through the plan. **Matter of McAteer, 130 B.R. 724 (Bankr. D. N.J. 1991)**.

EXEMPTIONS. The debtor claimed an exemption in an IRA, an ERISA qualified pension plan, life insurance policies, annuities and property held with a nondebtor spouse as tenants by the entireties but subject to several joint debts. The court held that the IRA was exempt and that ERISA did not preempt the Florida exemption for interests in ERISA qualified pension plans. The court also held that the entireties property was exempt only to the extent the value of the debtor's interest in the property exceeded the amount of the joint claims against the property. The debtor had purchased a life insurance policy and an annuity using exempt and nonexempt assets. The court held that the policy and annuity were exempt because the debtor made the purchases as part of continuing financial planning and not with the intent to defraud creditors. ***In re* Kimmel, 131 B.R. 223 (Bankr. S.D. Fla. 1991)**.

JURISDICTION. The debtor was an agricultural cooperative which had filed a Chapter 7 case. The plaintiffs were patrons of the cooperative who had purchased supplies from the cooperative which were stored at the cooperative. The defendant was a secured creditor of the debtor which had taken control of the debtor prior to bankruptcy. The plaintiffs alleged that the defendant seized the supplies purchased by the plaintiffs and stored by the defendant and charged additional amounts for the release of these supplies. The plaintiffs brought suit in a state court alleging conversion, fraud, intentional or negligent misrepresentation and fraudulent transfer. The defendant removed the case to the Bankruptcy Court and the plaintiffs filed a motion for remand back to the state court. The court held that it had jurisdiction over the fraudulent conversion action because the action was a core proceeding involving estate property. The court also held that the actions involving conversion were related proceedings and that the court would exercise its discretionary jurisdiction over these actions because the plaintiffs had also filed claims for the same amounts against the debtor and resolution of the conversion actions in favor of the plaintiffs would bar recovery in the bankruptcy proceeding. The court remanded the actions for fraud and intentional or negligent misrepresentations because the actions involved direct damage from the defendant to the plaintiffs, the result would not affect the bankruptcy estate, and the action could be concluded in the state court before final resolution of the bankruptcy case. ***In re* Fulda Independent Co-op, 130 B.R. 967 (Bankr. D. Minn. 1991)**.

CHAPTER 12

LIFE INSURANCE. Although a secured creditor had a security interest in a life insurance policy owned by one of the debtors, the security interest was not claimed by the creditor or debtor during the bankruptcy case until after confirmation of the plan and the death of the insured. The court held that the lien against the policy was extinguished by the confirmation of the plan because the lien was not included in the creditor's secured claim, although the court noted that the creditor could seek reconsideration of the secured claim if the creditor could show "cause." The creditor also argued that the insurance proceeds were not bankruptcy estate property because the debtor had assigned all interest in the proceeds to the creditor as security for a loan. The court held that the insurance proceeds were estate property subject to the court's jurisdiction and the plan because the debtor retained at least a contingent interest in the proceeds in that the assignment was limited by the amount necessary to cover the loan balance. In addition, the court held that the proceeds would be includible in income for purposes of determining disposable income subject to payment of unsecured creditors. The court rejected the creditor's argument that only federally taxable income was includible for purposes of determining disposable income. ***In re* Martin, 130 B.R. 951 (Bankr. N.D. Iowa 1991)**.

PLAN. On the date the debtors filed for Chapter 12, a secured claim was listed for a loan which had 10 years remaining of an original 20 year term. The plan proposed to stretch out the loan over 30 years with interest equal to the rate for 30 year treasury bonds plus 2 percent for risk. The creditor objected to the extended term and interest rate, arguing that the term exceeded both the length of new loans made by the creditor and the industry practice maximum of 20 years. The court acknowledged that plan payments over 30 years had been approved in the past but that industry practice had changed such that agricultural loans were no longer made beyond 20 years. Thus, the court fashioned a compromise allowing the plan payments over 15 years but amortized at 30 years. Although the creditor also objected to a fixed rate of interest as against industry practice, the court held that the fixed interest rate proposed by the plan was fair. ***In re* Koch, 131 B.R. 128 (Bankr. N.D. Iowa 1991)**.

TRUSTEE FEES. The debtors' plan proposed to pay all secured creditors outside of the plan without payment of the trustee's fees. The court held that all impaired secured claims were to be paid through the trustee and were subject to the trustee's fee. Of the claims not impaired under the plan, the debtor could make direct payments of claims of sophisticated lenders who actively participated in the bankruptcy case, who agreed to direct payments, and who had the means and motivation to monitor the payments. The debtors were required to make payments through the trustee of claims of unimpaired secured creditors who did not actively participate in the case and who did not agree to the direct payments. ***In re* Golden, 131 B.R. 201 (Bankr. N.D. Fla. 1991)**.

FEDERAL TAXATION

AUTOMATIC STAY. After the debtor filed for Chapter 13, the IRS filed a garnishment and a notice of tax lien and attached a refund of the debtor, although the IRS had received several written and oral notices of the bankruptcy case. The court held that the action violated the automatic stay and awarded the debtor compensatory damages, attorney fees and $3,525 in punitive damages. ***In re* Davis, 131 B.R. 50 (Bankr. E.D. Va. 1991)**.

AVOIDABLE TRANSFERS. The IRS served a notice of levy on the debtors wages more than 90 days before the debtor's filing for bankruptcy and amounts were deducted from the debtors wages during the 90 days before filing bankruptcy. The debtor moved to have the levied wages returned to the bankruptcy estate as avoidable preferential transfers. The IRS argued that it was immune from such actions and that the "transfer" occurred when the levy was noticed and not when the wages were deducted. The court held that the government had waived immunity under Section 106 and that the levies of the wages were transfers for purposes of the preferential transfer rules. The issue of avoidability of the transfers was left for determination after an evidentiary hearing. ***In re* Ballard, 131 B.R. 97 (Bankr. W.D. Wis. 1991)**.

DISMISSAL. Under incorrect legal advice, the debtor filed a Chapter 7 case believing that the debtor's tax liabilities were not dischargeable. The debtor sought dismissal of the case when the debtor learned that if the case was filed a short time later, the taxes would have been dischargeable. The appellate court upheld the bankruptcy court's refusal to dismiss the case because the debtor failed to demonstrate that no legal prejudice would result from the dismissal, in that the IRS would have been legally prejudiced by having the taxes become nondischargeable as a result of a dismissal and refiling. ***In re* Leach, 130 B.R. 855 (Bankr. 9th Cir. 1991)**.

ESTIMATED TAXES. Prior to filing for bankruptcy, the debtors filed their 1987 income tax return and elected to apply the refund to the 1988 estimated tax payments. The debtors filed for bankruptcy in 1988 and had sufficient funds withheld or paid to meet the 1988 tax liability and in 1989 the IRS refunded the excess from 1987. The trustee sought turnover of the refund from the IRS but the IRS paid the refund to the debtors anyway. The court held that the refund was attributable to the prebankruptcy period and was estate property and ordered the IRS to pay the same amount to the trustee. ***In re* Canon, 130 B.R. 748 (Bankr. N.D. Tex. 1991)**.

INTEREST AND PENALTIES. The debtors had filed a previous Chapter 13 case and under the plan paid amounts for federal income and withholding taxes. Although the payments were made to satisfy taxes for 1983 and 1981, the amounts paid were applied to taxes owed for 1976 through 1980. When the debtors filed the current Chapter 13 case, the IRS filed a claim for the 1983 and 1981 taxes plus interest and penalties. The court held that the interest and penalties were allowed claims. ***In re* Putnam, 131 B.R. 52 (Bankr. W.D. Va. 1991)**.

PRIORITY. The debtor entered into a cash collateral agreement with the IRS to substitute other collateral to secure a tax lien. The IRS argued that the agreement extinguished the tax lien and created an ordinary lien not subject to the priority rules of Section 724. The court held that Section 724 applied to liens securing claims for taxes, including the substitute lien granted in the cash collateral agreement. The court also held that the IRS claim was not entitled to Section 507(b) priority because the value of the tax lien was not diminished because of the automatic stay, but because of the Section 724 priority. ***In re* Life Imaging Corp., 131 B.R. 174 (Bankr. D. Colo. 1991)**.

TAX LIENS. The IRS had perfected a tax lien against the debtors' property prior to the debtors' filing for bankruptcy. The debtors' personal liability for the underlying taxes was discharged in the bankruptcy case but the lien was not avoided and the IRS levied against the debtors' insurance policy after the bankruptcy case was closed. The debtors argued that the lien was not perfected because actual notice was not given to the insurance company as required by I.R.C. § 6323(b)(9)(A). The court held that the actual notice requirement was available as a defense only by the insurance company and that the lien was valid as against the debtors upon assessment of the taxes. The court also held that the lien survived the bankruptcy discharge and was enforceable against the debtors' property. Finally, the court held that the amount of property subject to the lien was the cash value of the policy on the date of bankruptcy filing and that any additions made post-petition by the debtors were not subject to the lien. ***In re* Hanson, 91-2 U.S. Tax Cas. (CCH) ¶ 50,485 (Bankr. E.D. Mo. 1991)**.

COMMODITY FUTURES TRADING

FUTURES COMMISSION MERCHANT. The plaintiffs were sweet corn growers who entered into variable price sweet corn growing contracts with the defendant with the contract price determined by reference to field corn prices. The contracts provided for partial payment in October after harvest and the following June. In order to hedge the effect of significantly changing prices during the terms of the contracts, the defendant purchased field corn futures contracts. When the price of field corn dropped, the growers received more in their October payments than they were entitled to under the whole contracts and the defendant sought repayment of a portion of the October payments. The growers sought to prohibit the charges by filing suit against the defendant, alleging that the defendant violated the Commodity Exchange Act (CEA) as a nonregistered futures commission merchant (FCM). The court held that the CEA did not provide a private right of enforcement and that in any case, the defendant was not an FCM because the defendant purchased commodity futures only for its own use. **Marshall v. Green Giant Co., 942 F.2d 539 (8th Cir. 1991)**.

FEDERAL AGRICULTURAL PROGRAMS

CONSERVATION. The plaintiff owned farmland in the federal New Jersey Pinelands Reserve area and wanted to sell the land in ten acre parcels for residential farmettes. Under the federal program, the New Jersey Pinelands Commission had established a comprehensive management plan (CMP) for the reserve area restricting the sale of land to a minimum of 40 acres with a maximum of one acre which could be used for a residence and the rest devoted to agricultural use. The plaintiff argued that the restrictions were an unconstitutional taking of property without compensation. The court found that the restrictions were part of a valid governmental purpose of protecting the environment, preserving agriculture and regulating land use. The court held that the restrictions were not an unconstitutional taking because the plaintiff still maintained the present use of the land, could obtain compensation for voluntarily including restrictions on the property and was not restricted any more than similar property in the area. **Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991)**.

PERISHABLE AGRIC. COMMODITIES ACT. The plaintiff corporation was a fruit and vegetable brokerage, a licensee under PACA, which had failed to make prompt payment on 51 orders of produce. The failure of the company from an economic downturn in the produce industry prevented the company from making the payments and the company voluntarily gave up its license. The owner of the company admitted to being a person responsibly connected with the company and the ALJ had found that the failures to pay were frequent and flagrant violations of the PACA. In an attempt to mitigate the consequences of the violations, the ALJ backdated the publishing of the findings so that the owner could retain employment with another PACA licensee. The JO reversed the ALJ's decision to backdate the order. The court held that it had no authority to change the JO's order because the PACA mandated the sanctions and the effect on the owner was not a consideration in determinations involving sanctions against the company. **Farley & Calfee v. Dept. of Agric., 941 F.2d 964 (9th Cir. 1991)**.

PESTICIDES. The city of Boulder, Colorado enacted two pesticide ordinances, one provided for local enforcement of the Federal Insecticide, Fungicide and Rodenticide Act and Colorado pesticide laws and the other imposed local notification requirements. The court held that, under *Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476 (1991)*, the first ordinance was preempted by FIFRA but the second ordinance was not. **Coparr, Ltd. v. City of Boulder,**

942 F.2d 724 (10th Cir. 1991), ***aff'g*****, 735 F. Supp. 363 (D. Colo. 1989)**.

FEDERAL ESTATE AND GIFT TAX

ANNUAL EXCLUSION. The decedent established an irrevocable trust for three children with remainders to the beneficiaries' issue. The beneficiaries had a limited testamentary power of appointment over trust corpus. Within the last 20 days of December of each year, the primary beneficiaries and their issue all had the power to withdraw a pro rata share of contributions to the trust during the year. The decedent had filed gift tax returns for each year contributions were made to the trust and claimed the annual exclusion amount for each beneficiary and their issue. The IRS ruled that the annual exclusions were not allowed for the remainder holders because no withdrawals were made or intended. **Ltr. Rul. 9141008, June 24, 1991**.

APPORTIONMENT OF ESTATE TAX. Under the decedent's will, the estate taxes were to be treated as any other debts of the estate and paid without recovery by any legatee. The IRS ruled that the estate taxes were to be apportioned among the residuary legatees, thus decreasing the amount passing to the surviving spouse and eligible for the marital deduction. **Ltr. Rul. 9140005, June 25, 1991**.

COMMUNITY PROPERTY. The decedent and surviving spouse had executed a pre-nuptial agreement stating that the parties renounced their right to include post-marriage property in community property. The decedent's executrix challenged the agreement but the agreement was upheld by the state trial and appellate courts. The Tax Court deferred to the state court decisions and held that the agreement was valid and the property held by the decedent at death was separate property included in the gross estate. **Est. of Haydel v. Comm'r, T.C. Memo. 1991-507**.

DISCLAIMER. The surviving spouse disclaimed $400,000 of the decedent spouse's interest in a joint bank account which would have passed to the spouse under the decedent's will. The IRS ruled that the disclaimer, made within nine months after the decedent's death, was effective. **Ltr. Rul. 9140005, June 25, 1991**.

GENERATION SKIPPING TRANSFER TAX. The decedent had established a revocable trust which was last amended in December 1981. At the decedent's death, on December 1, 1986, the trust was divided into three trusts, a marital deduction trust, a residuary trust which was not funded, and a QTIP trust eligible for the marital deduction. The surviving spouse had a limited testamentary power of appointment over the QTIP trust and intended to exercise that power in a will for surviving children and their issue, including additional powers of appointment for each beneficiary. The IRS ruled that the revocable trust and testamentary trusts created by the decedent were not subject to GSTT. **Ltr. Rul. 9141015, July 9, 1991**.

STATUTE OF LIMITATIONS. In an audit of the decedent's estate tax return the IRS revalued for estate tax purposes gifts made more than three years before. The estate argued that the gift tax statute of limitations barred the revaluation but the court held that the gift tax statute of limitations did not apply to the valuation of gifts for estate tax purposes. **Stalcup v. U.S., 91-2 U.S. Tax Cas. (CCH) ¶ 60,086 (W.D. Okla. 1991)**.

The decedent established an irrevocable trust for three children with remainders to the beneficiaries' issue. The decedent had filed gift tax returns for each year contributions were made to the trust and claimed the annual exclusion amount for each beneficiary and their issue. The statute of limitations on the gifts had run for three of the four years of the trust. The IRS ruled that the most of the annual exclusions were not allowed and ruled that the adjusted taxable gifts could be redetermined for estate tax purposes even though the gift tax statute of limitations had run. The IRS also ruled that the gift taxes payable would be redetermined to reflect the gift tax which would have been payable if the gifts were properly reported, taking into account the unified credit available to the decedent at the time the gifts were made. **Ltr. Rul. 9141008, June 24, 1991**.

TRANSFERS WITHIN THREE YEARS OF DEATH. The decedent and spouse established a revocable trust funded with stock and with the decedent and spouse as initial trustees and as sole income beneficiaries. The trusts made no provision for distribution of corpus to the beneficiaries. The trustees had the power to revoke part of all of the trust, in which case the property reverted back to the decedent and spouse as community property. The trustees requested the corporation to transfer stock held in the trust to several family members. The trust was then amended to substitute the decedent's children as trustees. In the following taxable year, the new trustees requested the corporation to transfer stock to several members of the decedent's family. The decedent died within three years of both transfers. The IRS ruled that the transfers would be treated as revocations of portions of the trust and distributions of the stock to the decedent and spouse with further transfer to the donees. Thus, the stock transferred was not included in the decedent's gross estate. **Ltr. Rul. 9141005, July 5, 1991**.

As an employee of a corporation, the decedent was insured under a group life insurance plan which terminated upon the decedent's retirement, with the right of the decedent to convert the policy to an individual policy without a medical examination. The decedent exercised that right upon retirement but had the "new" policy owned by a trust established by the decedent's children. The decedent died within three years after the conversion of the policy. The estate argued that the "new" policy was a separate policy in which the decedent had no ownership interest and the proceeds of the policy were not included in the decedent's estate. The IRS ruled, however, that the "new" policy was substantially a continuation of the group life insurance policy in which the decedent did have an ownership interest, exercised by having the "new" policy transferred to the trust. Thus, the proceeds of the policy were included in the decedent's gross estate. **Ltr. Rul. 9141007, June 19, 1991**.

TRANSFERS WITH RETAINED INTERESTS. The decedent established a trust in 1930 with the decedent as life income beneficiary, with the remainder to the decedent's spouse. The decedent's spouse was co-trustee with a corporate co-trustee. The decedent retained the right to modify or revoke the trust with the consent of the spouse.

The IRS ruled that the trust was revocable because, under the law at the time of creation of the trust, the spouse's consent to revocation or modification of the trust was not adverse. **Ltr. Rul. 9140003, June 19, 1991**.

TRUSTS. A funeral home provided prearranged funeral contracts under which the funeral home deposited the purchaser's funds into a trust account with a financial institution as trustee. The purchase agreement could make the trust revocable or irrevocable. The IRS ruled that in both cases, the trusts were grantor trusts with income taxable to the purchaser. **Ltr. Rul. 9140006, June 25, 1991**.

In another similar ruling, the IRS also held that income from the trust which was paid to the funeral home was payment for merchandise or services and included in the funeral home's income. **Ltr. Rul. 9141040, July 16, 1991**.

The taxpayer established an irrevocable trust for the taxpayer's spouse and children. The beneficiaries had the power to withdraw current contributions up to the annual exclusion amount. The spouse had a lifetime and testamentary limited power to appoint trust principal. The spouse had included in a will a provision for appointment of the trust corpus to a trust for the taxpayer and a trust for the children. The IRS ruled that the taxpayer would be treated as the owner of the irrevocable trust, transfers of property to the trusts were completed gifts and the trust property would be included in the taxpayer's gross estate. The IRS also ruled that the trust property would not be included in the spouse's gross estate. **Ltr. Rul. 9141027, July 11, 1991**.

VALUATION. Under a predeceased spouse's will, the decedent had received a QTIP interest in the predeceased spouse's community property interest in real property. At the date of death, the decedent owned the QTIP interest, the decedent's community property interest in the property and a separate undivided interest in fee in the property. All of this property was included in the decedent's gross estate and the IRS ruled that all of the property interests would be aggregated for purposes of valuing the decedent's interest in the real property; thus, the decedent's estate was not entitled to a minority discount as to any particular ownership interest in the property held by the decedent. **Ltr. Rul. 9140002, June 18, 1991**.

The stock of a corporation was held entirely by members of one family, either outright, in trust or by custodians for minors. Under the corporation's articles of incorporation in effect prior to October 9, 1990, the stock buying and selling was restricted such that ownership was restricted to the corporation or family members. The corporation amended its articles to split each share of stock into 100 shares, with the resulting value of each shareholder's total stock remaining the same. The articles were also amended to conform the liability of directors to state law and were amended to increase the maximum number of directors allowed. The IRS ruled that the amendments did not substantially modify the restriction created prior to October 9, 1990 sufficient to subject the stock to the valuation rules of I.R.C. § 2703. **Ltr. Rul. 9141043, July 16, 1991**.

FEDERAL INCOME TAXATION

BUSINESS DEDUCTIONS. The taxpayer was denied deductions for pre-opening expenses, depreciation and other business operating expenses for a hunting lodge where the taxpayer failed to show that the taxpayer actively engaged in operating the lodge as a business for the production of income. **Est. of Miller v. Comm'r, T.C. Memo. 1991-515**.

COMMODITY STRADDLES. The taxpayer was a commodities dealer who entered into commodities straddles in 1976 and 1977 with no intention of making a profit. The taxpayer argued that Section 1808(d) of the Tax Reform Act of 1986 allowed commodities dealers to claim a loss from the sale of the first "leg" of the straddle whether or not the straddle was entered into for profit. Section 1808(d) provided that losses incurred by dealers were considered losses incurred in a trade or business and such losses were deductible. The court held that Section 1808(d) still required that a loss be suffered; thus, if a straddle had no economic effect, no loss could be suffered and Section 1808(d) did not apply. Because the taxpayer's straddle purchases were economic shams, the taxpayer had no economic losses to support loss deductions. **Cook v. Comm'r, 941 F.2d 734 (9th Cir. 1991), *aff'g*, 90 T.C. 975 (1988)**.

COOPERATIVES. A corporation amended its by-laws to require that all shareholders be producers who process their products through the corporation. The bylaws also allowed each shareholder one share of stock and one vote. The net profit/loss of the corporation was to be allocated according to each shareholder's share of production delivered to the corporation, with losses recouped by direct assessments. The IRS ruled that the corporation operated on a cooperative basis for purposes of Subchapter T with net income allocated qualifying as patronage dividends. The IRS refused to rule on the issue of deductibility of direct assessments because the deductibility depended upon particular facts and circumstances of the shareholders. **Ltr. Rul. 9141028, July 11, 1991**.

EMPLOYMENT TAXES. The IRS has announced that overpayments in a completed tax period may be credited to a succeeding period if the taxpayer so elects, or the taxpayer may file for a refund. **Rev. Proc. 91-52, I.R.B. 1991-35, 10, clarifying Rev. Proc. 90-52, 1990-2 C.B. 642**.

FAMILY ESTATE TRUSTS. The taxpayers transferred a veterinary practice and cattle business to a trust with the taxpayer and spouse as beneficiaries and trustees. The court held that the trust had no economic substance and all trust income was chargeable to the taxpayers, where the taxpayer retained control over all assets and performed no trustee duties.**Paulson v. Comm'r, T.C. Memo. 1991-508**.

INVESTMENT TAX CREDIT. The stipulated facts presented by the taxpayers, in the initial case, demonstrated that the leases of computer equipment by the taxpayers to a corporation controlled by them were for one year but were renewed each year. The Tax Court held that the burden was on the IRS to prove that the leases were intended to continue beyond half of the six year useful life of the computers and allowed the investment tax credit based on the stipulated facts. The Eighth Circuit Court of Appeals vacated and remanded the Tax Court opinion to provide grounds for its decision allowing investment tax credit. On remand, the Tax Court held that the IRS had met its burden by raising several issues that were not resolved in the stipulated facts--(1) why were the computers not sold to the corporation, (2) what was the business purpose for the one year leases, and (3) what other leases did the taxpayers have with third parties? Because the stipulated facts did not resolve these issues, summary judgment was awarded to the IRS. The appellate court affirmed. **Borchers v. Comm'r, 943 F.2d 22 (8th Cir. 1991),** ***aff'g*****, 95 T.C. 82 (1990),** ***on rem. from*** **889 F.2d 790 (8th Cir. 1989),** ***rev'g and rem'g*** **T.C. Memo. 1988-349**.

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. A partnership with less than 10 partners who were all individuals was excepted from the partnership audit procedures and the IRS was not required to issue a final partnership administrative adjustment before the Tax Court would have jurisdiction over a deficiency determination involving a partnership loss claimed by a partner. **McKnight v. Comm'r, T.C. Memo. 1991-514**.

PENALTIES. The taxpayers were assessed for tax deficiencies for tax years 1982 through 1984 but had not been assessed the penalty for substantial underpayment of tax which was increased from 10 to 25 percent by the Tax Reform Act of 1986. After passage of the Act, the IRS assessed the 25 percent penalty and the taxpayers argued that the retroactive application of the increase was unconstitutional. The court upheld the retroactive assessment of the penalty in cases where the penalty had not been assessed as of the effective date of the 1986 Act. **Licari v. Comm'r, 91-2 U.S. Tax Cas. (CCH) ¶ 50,494 (9th Cir. 1991),** ***aff'g*****, T.C. Memo. 1990-4**.

RETIREMENT PLANS. The IRS has announced that new regulations, Treas. Reg. § 54.4979-1, have changed the due date, to the last day of the 15th month after the close of the plan year, for the payment of excise tax on excess contributions to plans with cash or deferred arrangements. **Ann. 91-150, I.R.B. 1991-41, 55**.

SAFE HARBOR INTEREST RATES

NOVEMBER 1991

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	5.89	5.81	5.77	5.74
110% AFR	6.49	6.39	6.34	6.31
120% AFR	7.09	6.97	6.91	6.87
		Mid-term		
AFR	7.22	7.09	7.03	6.99
110% AFR	7.95	7.80	7.73	7.68
120% AFR	8.69	8.51	8.42	8.36
		Long-term		
AFR	7.84	7.69	7.62	7.57
110% AFR	8.64	8.46	8.37	8.31
120% AFR	9.44	9.23	9.13	9.06

SELF-EMPLOYMENT. The taxpayer made contributions to a Keogh account and claimed the contributions as a business expense in calculating self-employment income subject to social security taxes. The court held that the contributions were not deductible from self-employment income because the contributions were not deductible as business expenses. **Gale v. U.S., 768 F. Supp. 1305 (N.D. Ill. 1991)**.

SOCIAL SECURITY TAX. Beginning with the January 3, 1991 payment, the monthly social security benefit payments will increase 3.7 percent. The maximum amount of annual wages subject to Old Age Survivors and Disability Insurance for 1992 is $55,500, with a maximum of $130,300 subject to the medicare portion of the tax. The maximum amount of annual earnings before reduction of benefits is $10,200 for persons aged 65 through 69 and $7,440 for persons under age 65. **HHS News Release, October 17, 1991**.

TAX LIENS. In 1980, the articles of incorporation of a farm corporation owned by the taxpayers were forfeited by the state for failure to pay state franchise taxes. In 1985 the IRS assessed taxes against the corporation and filed notice of tax liens against the corporation's farmland. The IRS attempted a levy against the proceeds of a governmental easement by condemnation over some of the farmland. The taxpayers argued that the levy was improper because the land did not belong to the corporation after three years after the forfeiture of the articles of incorporation. The court held that although the corporation could no longer sue or be sued after three years after the forfeiture, the title to the land remained with the corporation because no conveyance had been made to the taxpayers as individuals. **Pottorf v. U.S., 91-2 U.S. Tax Cas. (CCH) ¶ 50,487 (D. Kan. 1991)**.

MORTGAGES

PREJUDGMENT INTEREST. The debtors had defaulted on a loan from the plaintiff in 1986 and the plaintiff sought foreclosure in 1988. The trial court disallowed prejudgment interest from the time of the default to the date of the foreclosure because, because the debtors had made several attempts over that time to satisfy the loan by deeding the property to the plaintiff or restructuring the loan. The appellate court reversed and held that prejudgment interest should be allowed because the debtors were as responsible as the plaintiff for the delays in restructuring the loan. **Farm Credit Bank of Spokane v. Tucker, 813 P.2d 619 (Wash. Ct. App. 1991)**.

SALE. After the plaintiffs defaulted on a loan from the defendant, the defendant obtained a foreclosure judgment and purchased the collateral, several separate parcels of land, as one unit at the foreclosure sale. The defendant then sold the parcels individually. The plaintiffs objected to the form of the sale, arguing that the single foreclosure sale of the parcels prevented the land from obtaining the best price and prevented the plaintiffs from buying or redeeming some of the parcels. The trial court had dismissed the plaintiffs' petition, which the appellate court treated as a summary judgment. The court held that the plaintiffs had demonstrated that there could be facts showing that the single sale of the separate parcels resulted in injury to the plaintiffs' rights but that the foreclosure sale could not be avoided if the trial court found that the current owners were bona fide purchasers. The appellate court acknowledged that the trial court had equitable powers to formulate other equitable remedies. **Garris v. Federal Land Bank of Jackson, 584 So.2d 791 (Ala. 1991)**.

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SECURED TRANSACTIONS

AUCTIONEERS. The debtor had granted the bank a security interest in all livestock in January 1986. From January 1986 through January 1987, the defendant, a livestock market agency, sold hogs belonging to the debtor and subject to the security interest and remitted the proceeds to the debtor. On February 7, 1986, the bank was declared insolvent and the FDIC was appointed as receiver. On May 5, 1986, the FDIC sent notice to the debtor not to sell any collateral without prior written approval. On July 7, 1986, the FDIC sent notice to the defendant of the security interest in the debtor's hogs. The FDIC sued the defendant for the proceeds of the sales of the debtor's hogs made by the defendant from January 1986 through January 1987. The court held that the bank had waived its security interest in the hogs for the period from the granting of the security interest until the bank was declared insolvent because of the bank's course of dealing with the debtor in not requiring consent to sell the collateral prior to sales. The trial court held that upon the takeover of the bank by the FDIC, the FDIC had not agreed to the bank's waiver of the debtor's security interest because none of the factors under 12 U.S.C. § 1823(e) were met by the waiver; thus, the security interest remained valid from the date of the FDIC takeover until December 23, 1986. The appellate court reversed on this issue, holding that state law applied, and under Neb. Rev. Stat. § 9-307(1), (4), (7) in effect at the time, the defendant had posted the notice required by Section 9-307(7) and was, therefore, able to sell the debtor's hogs free of the security interest. On December 23, 1986, the date Nebraska established a central filing system under the federal farm products rule, the FDIC was required to file its security interest with the secretary of state, which it failed to do. Therefore, from December 23, 1986 through February 1987, the defendant was not liable for the proceeds of the sales of the collateral. **FDIC v. Bowles Livestock Comm'n Co., 937 F.2d 1350 (8th Cir. 1991),** ***rev'g and rem'g*****, 739 F. Supp. 1364 (D. Neb. 1990)**.

STATE TAXATION

AGRICULTURAL USE. The plaintiff purchased two acres of unimproved land which were part of a larger tract assessed as open land. The plaintiff filed for continuation of the open land classification of the two acres. The trial court upheld the denial of the application, holding that the two acres did not meet any of the qualifications for the open land classification. The appellate court reversed and held that the plaintiff's expert witness provided sufficient evidence that the land qualified as open land, under R.I. Gen. Laws § 44-27-2(c), because the land was in a 100 year flood plain and was within a saltwater marsh coastline area. **Denault v. Fitzgerald, 593 A.2d 453 (R.I. 1991)**.

CITATION UPDATES

In re **Fernandez, 130 B.R. 757 (W.D. Mich. 1991)** (responsible person) see p. 182 *supra*.

Est. of Johnson v. U.S., 941 F.2d 1318 (5th Cir. 1991), ***rev'g*****, 742 F. Supp. 940 (S.D. Miss. 1990)** (charitable deduction) see p. 180 *supra*.

In re **Rasbury, 130 B.R. 990 (Bankr. N.D. Ala. 1991)** (withholding taxes) see p. 183 *supra*.

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